No. 84-456

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WILLIAM J. SCOTT and HERBERT CAPLAN,

Petitioners,

vs.

WILLIAM J. BENSON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether this Court's decision in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) requires a determination regarding qualified immunity not only whether there was a clearly established constitutional or statutory right, but also whether a public official's conduct was objectively reasonable in light of clearly established law.

PARTIES

The following is a list of all parties involved in this application for a Writ of Certiorari:

A. Petitioners:

1. William J. Scott
2. Herbert Caplan

B. Respondent:

1. William J. Benson

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Petitioners William J. Scott, former Attorney General for the State of Illinois, and Herbert Caplan, former First Assistant Attorney General, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on May 9, 1984.

OPINIONS RENDERED IN LOWER COURTS

The opinion of the Court of Appeals is reported at 734 F.2d 1181 and is reproduced herein as Appendix A. The Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois, Eastern Division, is not reported and is included herein as Appendix B.

JURISDICTION

The judgment and opinion of the Court of Appeals for the Seventh Circuit was entered on May 9, 1984. A timely petition for rehearing was denied on July 2, 1984 (Appendix C), and this petition for writ of certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The respondent, William Benson ["Benson"], entered into contracts with the Illinois Department of Revenue ["Department"] to provide certain technical services in enforcement of the Illinois Cigarette Tax Act against persons purchasing cigarettes in Indiana and bringing them into Illinois. The contracts were terminable on written notice by either party. The contracts provided that "for liability purposes only, William Benson will be considered an employee rather than an independent contractor," so

that he would be covered by the Department's insurance. The expiration date of the last contract was June 30, 1976.

In 1975, eight separate civil rights actions were filed in the federal district court concerning the Department's enforcement of the Act. Benson was named as a defendant in four of these suits. Petitioner Scott, then the Illinois Attorney General, initially represented all defendants, including Benson, in the eight civil rights suits.

During this litigation, Benson submitted an affidavit in a separate state court case which was critical of the Department. Benson's employment contract was terminated by the Department shortly thereafter, on June 24, 1976.

In October, 1976, the Attorney General was granted leave by court order to withdraw in all of the civil rights actions as counsel for all defendants except himself as a separate defendant. The withdrawal was because of a conflict of interest. All of the defendants were advised to retain their own counsel. Subsequently, the Department assumed the cost of substitute representation for all Department defendants except Benson.

Beginning October 3, 1977, the state insurance carrier provided Benson with counsel in the four civil rights actions in which he was a defendant, pursuant to Benson's contract. Shortly thereafter, Benson also hired two private attorneys for those same cases.

On December 3, 1977, the Illinois Representation and Indemnification of State Employees Act ["Indemnification Act"], Ill.Rev.Stat., 1981, ch. 127, § 1301 *et seq.*, became effective. The Act provides for representation by the Attorney General of state employees sued for acts or omissions committed during the course of their state em-

ployment. It also provides that, in the event the Attorney General must withdraw because of a conflict of interest, the state will reimburse the employee for costs incurred in obtaining his or her own counsel. The Act expressly excludes independent contractors from its coverage.

Shortly after the Indemnification Act became effective, Benson requested representation under the Act by the Attorney General in the civil rights actions in which he was a defendant. The request was denied by letter written by petitioner Caplan, then the First Assistant Attorney General. The refusal was based on the viewing of Benson by the Attorney General as an independent contractor and, as such, not entitled to representation under the Act.

Benson then filed the instant civil rights action against petitioners Scott and Caplan.* The complaint alleged that the denial of state representation and reimbursement of attorney's fees incurred in defending the civil rights actions violated due process and was in retaliation for Benson's exercise of his First Amendment rights.

Petitioners Scott and Caplan filed a motion to dismiss, interposing the defense of qualified immunity. The motion was converted into a motion for summary judgment. In the summary judgment proceeding it was clarified that (1) Benson had been represented by counsel supplied by

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* Prior to filing the instant action, Benson filed two other civil rights actions, one against the Director of the Department of Revenue and others; the second against the Illinois Governor and others. Partial summary judgment was entered against Benson in these consolidated cases because Benson had failed to show a property interest in continued employment and because he had no cause of action against the Department for withdrawal of state supplied legal counsel.

the state insurance carrier in the four civil rights actions in which he was a defendant, without expense to him; (2) the four civil rights actions were finally settled and dismissed with prejudice by the court, without any expense to Benson; (3) beginning in December of 1978, the state liability insurer had also paid the fees of Benson's private attorneys in the four civil rights actions; and (4) during the one year period from October, 1977 to December, 1978, when the expenses of Benson's private attorneys were not paid by the insurance carrier, the insurance carrier was providing Benson with other counsel with no expense to Benson.

The District Court granted summary judgment against Benson, holding that petitioners Scott and Caplan were entitled to qualified immunity because their refusal to reimburse Benson for his legal expenses was objectively reasonable under the Illinois Indemnification Act; also that Benson was not deprived of property rights without due process.

The Court of Appeals affirmed the judgment of the District Court on Benson's due process claim. The Court of Appeals reversed the judgment on Benson's First Amendment claim, finding that the right of employees to be free from retaliation for their exercise of First Amendment rights has been clear at least since *Pickering v. Board of Education*, 391 U.S. 563 (1968) was decided. The Court of Appeals remanded the case for further proceedings.

REASONS FOR GRANTING THE WRIT

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), this Court redefined the limits of qualified immunity for public officials, placing "[r]eliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law." Under *Harlow*, the focus is on the "objective reasonableness of an official's acts." So long as the actions of high government officials are objectively reasonable, no further inquiry should take place. If the objective test of *Harlow* is met, discovery aimed at finding out what the defendants actually and subjectively intended is irrelevant. The rationale underlying the objective standard is that public officials should not hesitate to engage in decision-making for fear they may later be subject to civil liability for their official acts; also that this standard would permit "[i]nsubstantial lawsuits [to] be quickly terminated."

The District Court held that the conduct of petitioners Scott and Caplan was objectively reasonable in the circumstances of this case and that they are, therefore, entitled to qualified immunity regarding Benson's First Amendment claim. In reversing the District Court's decision in this regard, the Circuit Court of Appeals stated that "[t]he right of employees to be free from retaliation for their exercise of First Amendment rights has been clear since at least 1968." From this, the Court summarily concluded that defendants are not entitled to qualified immunity. The Court of Appeals failed to consider in any way the objective reasonableness of the petitioners' conduct in the unique circumstances of this case. It was not claimed throughout these proceedings that employees may be retaliated against for the exercise of their First

Amendment rights, or that the law was not clear in this regard. It is submitted, however, that under *Harlow* the courts should not only determine whether the law in question was clearly established when the conduct complained of occurred, but must also determine whether an official's conduct was objectively reasonable when measured against such clearly established law. The Court of Appeals' narrow application of the ruling in *Harlow* misperceives the premise on which such ruling rested. The result is precisely the burden *Harlow* sought to avoid.

Harlow focused on the need to enable courts to dismiss "insubstantial" lawsuits before discovery and trial. Yet, the conclusion reached by the Court of Appeals offers litigants a means to circumvent the new rule in *Harlow* simply by pleading, as was done here, that an act was performed with an intent to violate clearly established constitutional rights. As was recently stated in *Hobson v. Wilson*, 737 F.2d 1, 29 (D.C. Cir. 1984), "[P]laintiffs might allege facts demonstrating that defendants have acted lawfully, append a claim that they did so with an unconstitutional motive, and as a consequence usher defendants into discovery, and perhaps trial, with no hope of success on the merits."

This Court recognized such problem on a number of occasions and has, consequently, called for more than a mere inquiry as to whether a constitutional right was clearly established. The Court has admonished the judiciary in this regard to exercise a "firm application of the Federal Rules of Civil Procedure" and to dismiss insubstantial claims on a properly supported motion for summary judgment. *Harlow v. Fitzgerald*, 457 U.S. at 819 fn. 35; *Hanrahan v. Hampton*, 446 U.S. 754, 765 (1980) (Justice Powell, concurring in part and dissenting in part); *Butz v. Economou*, 438 U.S. 478 (1978). The Court has also em-

phasized that summary judgment will be readily available to public official's whenever, as here, a plaintiff cannot prove as a threshold matter "that a violation of his constitutional rights actually occurred." *Harlow v. Fitzgerald*, 457 U.S. at 821 (Justice Brennan, concurring). The District Court heeded these directives; the Court of Appeals did not.

Numerous factors in this case affirm the insubstantiality of Benson's lawsuit, but none of these were considered by the Court of Appeals. In the first instance, Benson specifically requested representation by the Attorney General, in the four civil rights actions in which he was a defendant, under the Illinois Indemnification Act. (Ill.Rev. Stat., 1981, ch. 127, § 1301 *et seq.*) Benson's request was made shortly after the Act went into effect. Benson's request for representation and the subsequent denial by the Attorney General cannot be considered in a vacuum, nor can the relevant law under which the Attorney General made the decision regarding Benson's request be disregarded, as the Court of Appeals did. Upon receiving Benson's request for representation, petitioners Scott and Caplan were obligated to consider and interpret the new Act governing representation by the Attorney General. Whether or not their interpretation of controlling Illinois law was correct, it is well-settled that public officials will not be liable for damages for mere mistakes in judgment, whether the mistake is one of fact or one of law. *Butz v. Economou*, 438 U.S. at 507.

In addition, the Indemnification Act provides for representation of state employees in certain civil cases, and it expressly excludes independent contractors. Benson was labeled an independent contractor in the contract he signed, so he appeared not to be entitled to state representation

before or after the new Act was passed. Benson's contract in itself provides an objectively reasonable basis for the Attorney General's declining to represent Benson or provide substitute representation. An affidavit submitted to the District Court by petitioner Caplan established that he was, in fact, informed by the Department of Revenue that Benson was an independent contractor with the Department. Both Benson's contract and this information support the objective reasonableness of the Attorney General's position that Benson was an independent contractor and, as such, not included in the Act's coverage. Nothing in the myriad of pleadings, exhibits and affidavits submitted to the District Court suggests otherwise.

There is the further practical reality in this case that at the time Benson requested representation by the Attorney General he was, in fact, already being represented in the four civil rights actions by a private attorney at the direction of the state's liability insurer. All of the legal fees and expenses of this attorney were paid for by the insurance company. This attorney played an active role in the defense and settlement of the civil rights actions in which Benson was a defendant. The settlement of the four civil rights cases did not result in any financial liability for Benson. While Benson was being represented by counsel provided by the State insurance carrier, he also separately hired two additional private attorneys to represent him in the four civil rights actions. Even the fees of these two attorneys were substantially paid by the insurance carrier. During the limited period when the expenses of Benson's private attorneys were not paid by the insurance company, Benson was already being represented by counsel provided by the insurance carrier without any expense to Benson.

In essence, Benson's request that the Attorney General provide him with representation, when he was already being provided with representation that was indirectly paid for by the State, was simply an assertion that the State provide him with two separate sets of attorneys at State expense. When properly identified, such an assertion raises serious questions regarding the substantiality of Benson's present lawsuit. This is precisely the kind of lawsuit which concerned the Court in *Harlow*, and which unquestionably motivated the Court to limit the immunity standard to the objective reasonableness of an official's conduct so that such insubstantial lawsuits can be quickly terminated.

A firm application of the Federal Rules of Civil Procedure allows a District Court to refuse to permit discovery and grant summary judgment where a plaintiff fails to produce any specific facts whatsoever to support a violation of that right. *Contemporary Mission, Inc. v. United States Postal Service*, 648 F.2d 97, 106-07 (2d Cir. 1981). There is nothing anywhere in the record to suggest that the Attorney General's position was based on anything other than his informed view of Benson's employment status and his reasonable interpretation of governing law. In the absence of any contrary evidence, the refusal to provide Benson with substitute representation or to reimburse him for the fees of his privately-retained attorneys was objectively reasonable. Under *Harlow*, petitioners Scott and Caplan were entitled to summary judgment. As the Court held in *Harlow*, Benson's bare allegations in his complaint that the denial of representation was in retaliation for the exercise of his First Amendment rights "should not suffice to subject government officials to the costs of trial or to the burdens

of far reaching discovery." 457 U.S. at 817-18. Nevertheless, this is the result of the Court of Appeals' decision.

The issue in this case is of substantial importance not only regarding the instant petitioners, but also regarding the manner in which the ruling in *Harlow* will be applied in future cases alleging a violation of constitutional rights. There are no genuine issues as to any material facts to be decided in this case. It is not claimed in this case that the State had initially agreed to pay Benson for substitute legal representation which it refused to continue after Benson criticized the Department of Revenue. Nor is there any allegation that the Attorney General in any way interfered with the adequate representation by counsel provided by the State insurance carrier after Benson criticized the Department. Likewise, there is no dispute that the Attorney General could not refuse to reimburse Benson for legal expenses in retaliation for the exercise of Benson's First Amendment rights. But *Harlow* requires the courts to also examine whether a public official's conduct was objectively reasonable, as measured by an employee's right to be free from retaliation for his exercise of First Amendment rights. The Court of Appeals wholly failed to address this question. As a result, the Court of Appeals' holding negates, in most instances, the defense of qualified immunity where there is a mere allegation of a First Amendment violation. The Court of Appeals' holding also negates the rationale underlying the ruling in *Harlow* that insubstantial lawsuits such as this should be quickly terminated.

CONCLUSION

For the foregoing reasons, the petitioners, William J. Scott and Herbert Caplan, respectfully request that a writ of certiorari issue to review the decision of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

WILLIAM J. BENSON,

Plaintiff-Appellant,

No. 83-1040 *v.*

WILLIAM J. SCOTT and HERBERT CAPLAN,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 81 C 6591—**William T. Hart**, *Judge.*

ARGUED JANUARY 11, 1984—DECIDED MAY 9, 1984

Before WOOD and ESCHBACH, *Circuit Judges*, and SWYGERT, *Senior Circuit Judge.*

ESCHBACH, *Circuit Judge.*[1] The appellant, William J. Benson, initiated this action under 42 U.S.C. § 1983 in the district court alleging that William J. Scott, former Illinois Attorney General, and Herbert Caplan, former Illinois First Assistant Attorney General, violated Benson's rights under the First and Fourteenth Amendments. The district court entered summary judgment for the defen-

[1] The author acknowledges the substantial assistance of Judge Swygert to this opinion reflected in Section I and portions of Section II, B.

dants, finding that they were entitled to qualified immunity from liability for their actions. We affirm the district court's finding of immunity with respect to Benson's due process claim. However, we disagree with the district court that the defendants are immune from suit on Benson's First Amendment claim. Accordingly, we reverse the judgment of the district court on that claim, and remand the case for further proceedings.

I.

Benson was employed by the Illinois Department of Revenue ("Department") from 1971 until 1976. On November 1, 1974, Benson entered into a one-year written employment contract with the Department to "undertake projects requiring personal and technical services as assigned by the Department of Revenue concerning pending investigations." The contract was terminable at the will of either party upon written notice, and provided that Benson was to be paid $750 per month. The contract further stated: "It is expressly agreed that for liability insurance purposes only, William Benson will be considered an employee rather than an independent contractor." A similar contract was entered commencing November 1, 1975, and terminating June 30, 1976. Benson was terminated from his employment on June 24, 1976.

Pursuant to his employment contract, Benson was assigned to assist in the enforcement of the Illinois Cigarette Tax Act, 1981 Ill. Rev. Stat. ch. 1209, §§ 453.1-.67, against persons purchasing cigarettes in Indiana and bringing them into Illinois. Beginning in March 1975, eight civil rights actions were filed in federal district court concerning the Department's enforcement of the Act. Benson was named as a defendant in four of those suits.

Initially, the Attorney General's office represented all of the defendants in the civil rights actions. On September 2, 1976, the Attorney General's office sent letters to the civil rights defendants informing them that the office was withdrawing appearances in all of the actions for everyone

except the Attorney General because of conflicts of interest. The letter instructed the defendants: "You should immediately make arrangements to obtain your personal counsel at your own expense and substitute appearances before the hearing dates." On October 1, the Attorney General formally withdrew his appearances for all defendants except himself. Thereafter, the Department assumed the cost of substitute representation for all Department defendants except Benson.

Benson was without counsel for approximately one year. On October 3, 1977, counsel, at the direction of and paid for by the insurance company, appeared on Benson's behalf in the four actions in which he was a defendant. On October 19, 1977, Benson engaged private counsel to represent him in the actions.

On December 3, 1977, the Illinois Representation and Indemnification of State Employees Act ("Indemnification Act"), 1981 Ill. Rev. Stat. ch. 127, §§ 1301-02, became effective.[2] The Indemnification Act provides for represen-

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[2] The act provides:

> Representation and indemnification of State employees. (a) In the event that any civil proceeding is commenced against any State employee, alleging the deprivation of a civil or constitutional right and arising out of any act or omission occurring within the scope of the employee's State employment, the Attorney General shall, upon timely and appropriate notice to him by such employee, appear on behalf of such employee and defend the action . . . . (b) In the event that the Attorney General determines that so appearing and defending an employee either (1) involves an actual or potential conflict of interest, or (2) that the act or omission that gave rise to the claim was not within the scope of the employee's State employment or was intentional, willful or wanton misconduct, the Attorney General shall decline in writing to appear or defend or shall promptly take appropriate action to withdraw as attorney for such employee. Upon receipt of such declination or upon such withdrawal by the Attorney General on the basis of an actual or potential conflict of interest, the State employee may employ his own attorney to appear and defend, in which

(Footnote continued on following page)

tation by the Attorney General for employees of the state sued for acts or omissions committed during the course of their employment. It also provides that in the event the Attorney General must withdraw because of a conflict of interest, the state will reimburse the employee for the costs incurred in obtaining his or her own counsel. The statute expressly excludes independent contractors from its coverage.

On October 28, 1977, Benson requested the Attorney General's office to provide him with representation in the civil rights actions pursuant to the Indemnification Act. On February 22, 1978, defendant Herbert Caplan, responding by letter to Benson's request, stated:

> Your letter requesting representation pursuant to [the Indemnification Act] has been reviewed. We are informed that your relationship with the Illinois Department of Revenue was pursuant to contract .... [I]t appears that you were not an employee within the definition of section 1(b) of the act and would not be entitled to its provisions.

Beginning in December, 1978, the state liability insurer assumed the costs of Benson's privately-retained counsel. On March 9, 1981, the claims against Benson were settled and dismissed with prejudice by the court. The settlement did not involve any payment by Benson. Benson did, however, incur the expenses of his counsel from October 19, 1977 to December, 1978.

Benson filed this action on November 24, 1981, against defendants Scott and Caplan. The complaint alleges that

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[2] *continued*

event the State shall pay the employee's court costs, litigation expenses and attorney's fees to the extent approved by the Attorney General as reasonable, as they are incurred.

An employee is defined as "any . . . employee of the State ... but does not mean an independent contractor except as provided in this Section."

the defendants refused to reimburse Benson for his legal expenses in retaliation for Benson's dissemination to the news media and law enforcement agencies of information and evidence concerning Department officials' selective enforcement of the Cigarette Tax Act and improprieties in state court proceedings. The complaint further alleges that the denial of reimbursement violated, after 1977, the Indemnification Act, and was contrary to an established state custom and practice of the Attorney General's office prior to 1977 of representing employees in civil rights actions. The custom was alleged to include allowing state agencies to engage private counsel at state expense when the Attorney General did not appear. Benson sought damages under 42 U.S.C. § 1983 for violations of his First and Fourteenth Amendment rights.

The defendants filed a motion to dismiss, interposing the defense of qualified immunity. The motion was converted into one for summary judgment, and was granted. The court held that the defendants were entitled to qualified immunity from suit for their refusal to reimburse Benson for his legal expenses as their actions were objectively reasonable under the Illinois Indemnification Act. The court further held, recognizing that it did not need to reach the issue, that Benson's due process rights were not violated because state law remedies were available which satisfied the due process clause.

II.

A. *Due Process Claim*

Benson claims that the grant of summary judgment on his due process claim was erroneous because a material issue of disputed fact remained; that is, whether Benson was an employee or an independent contractor. Benson reasons that so long as his employment status remains disputed, his right to the state benefit also remains disputed, and no decision can be made about whether the

defendants' denial of that right was objectively reasonable for purposes of qualified immunity.[3]

The usual analysis of a due process claim proceeds sequentially. First, one determines, as Benson would have us require the district court do here, whether a protected property interest exists at all. If such an interest is found, one determines what procedures must be followed before the government may take action adversely affecting that interest. *See, e.g., Devine v. Cleland*, 616 F.2d 1080 (9th Cir. 1980); *Larry v. Lawler*, 605 F.2d 954 (7th Cir. 1978). In this case we may assume, given the discussion of the issue by the district court, that state employees have a right to be represented by the state in civil actions against them arising out of their employment. However, finding a protected interest in substitute representation will not end the inquiry, for Benson's claim is that his procedural rights were violated. Since the defendants have interposed a defense of qualified immunity, we must ask whether the Attorney General, in making the determination that Benson was not qualified to receive benefits under the statute or custom of the state, violated clearly established procedures of which a reasonable person should have been aware. *Harlow v. Fitzgerald*, 102 S. Ct. 2727, 2738 (1982).

As the Supreme Court has recognized, " 'due process' has never been, and perhaps can never be, precisely defined." *Lassiter v. Dept. of Soc. Services of Durham Cty.*, 452 U.S. 18, 25 (1981). While the requirements of due process have been settled by the case law for a variety of situations, *see, e.g., Perry v. Sindermann*, 408 U.S. 593 (1972) (pretermination hearing required before *de facto*

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[3] When the defendants raised the defense of qualified immunity, the district court stayed discovery pending resolution of the motion. Benson contends that the stay was erroneous. In *Harlow*, however, the Court concluded that discovery should not be allowed until the threshold issue of immunity is resolved. *Harlow v. Fitzgerald*, 102 S. Ct. 2727, 2739 (1982).

tenured teacher may be fired); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (hearing required before welfare benefits may be terminated), the process that is due in any given case varies according to the factual circumstances of the case and the nature of the interests involved. *See Mathews v. Eldridge*, 424 U.S. 319 (1976). Here, the Attorney General was asked to determine whether Benson qualified for state-provided representation under a statute which the parties concede codifies prior state practice. Accordingly, he contacted the Department of Revenue, which informed him that Benson was employed as an independent contractor. Since the statute by its express terms denies representation to independent contractors, the Attorney General notified Benson that his office was precluded from providing such representation. Perhaps the Attorney General should have used more elaborate procedures in making this determination, but it is not clear even today that the Constitution required him to do so. Since the law establishing which procedures are constitutionally-mandated is uncertain or unclear, the Attorney General is entitled to qualified immunity from Benson's claim that his right to procedural due process has been violated. *Harlow v. Fitzgerald*, 102 S. Ct. 2727 (1982).

B. *First Amendment Claim*

The district court also found that the defendants were entitled to qualified immunity from Benson's First Amendment claim. Benson alleged that the defendants had refused to provide him with substitute representation, or to reimburse him for his legal expenses, in retaliation for his exercise of First Amendment rights. The district court held that the defendants' conduct in refusing to reimburse Benson was objectively reasonable, because the statute upon which Benson premised his claim to reimbursement excludes independent contractors.

As we noted above, *Harlow* dictates that a claim of qualified immunity by an executive official must be sustained if the official's conduct "does not violate clearly

established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 102 S. Ct. at 2738. In determining whether the actions alleged by Benson violate clearly established law, however, the relevant legal framework is not the Illinois Indemnification Act, as the defendants and the district court believed. Benson's claim is that the Attorney General violated his rights under the First Amendment. This claim does not require Benson to show that he had a right to reimbursement under the Act, for even where there is no right to a valuable government benefit, the denial of that benefit may not be premised on an employee's exercise of his First Amendment rights. *See Healy v. James*, 408 U.S. 169, 180-81 (1972); *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968); *Hostrop v. Board of Junior College District No. 515*, 471 F.2d 488, 491-93 (7th Cir.), *cert. denied*, 411 U.S. 967 (1973). The right of employees to be free from retaliation for their exercise of First Amendment rights has been clear since at least 1968, when the Supreme Court decided *Pickering v. Board of Education*, *supra*. The defendants cannot claim that the law was unclear in 1977, when the events at issue in this case allegedly occurred.

However, the defendants attempt to avoid the impact of the cases cited above by analogizing this case to *Egger v. Phillips*, 710 F.2d 292 (7th Cir.), *cert. denied*, 104 S. Ct. 284 (1983). In *Egger*, this court held that Phillips, an FBI official, was immune from liability for transferring Egger, an employee who had complained to FBI supervisors about a co-worker. The court found that a reasonable person in Phillips' position could not have been expected to know at the time he made the transfer that he was violating Egger's First Amendment rights. *Egger* is clearly distinguishable. First, most of the doctrinal uncertainty which led the court to conclude that the law was unclear in *Egger* centered on the fact that Egger was a public employee whose criticisms were made in the workplace. The court noted that "until the Supreme Court's decision in *Givhan v. Western Line Consolidated School*

District, 439 U.S. 410, 99 S. Ct. 693, 58 L.Ed.2d 619 (1979), it was an open question whether public employees' on-the-job expressions were entitled to constitutional protection." 710 F.2d at 315. In the instant case, however, Benson alleges that it was his criticisms of the Department of Revenue to the news media and other law enforcement agencies which led to the retaliation. Second, Benson's employment with the Department ended on June 24, 1976. The Attorney General did not withdraw representation until October of that year, and Benson's request for substitute representation was not denied until 1978. Thus, many of the uncertainties found in *Egger* which resulted from the continuing concern that the state as employer should be able, in certain circumstances, to regulate the public utterances of its employees are not present here. Benson was no longer a state employee at the time of the alleged violation.

We conclude that at least on the present record, the defendants are not entitled to qualified immunity with respect to Benson's First Amendment claim. Of course, we express no opinion on whether Benson will be able to prove the allegations of his complaint. And we note that the defendants are still free to establish that they would have reached the same decision not to reimburse Benson even in the absence of protected conduct. *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 287 (1977).

III.

For the reasons expressed in this opinion, the judgment of the district court on Benson's due process claim is affirmed. The judgment on Benson's First Amendment claim is reversed, and the case is remanded to the district court for further proceedings. Each party shall bear his own costs on appeal.

WOOD, *Circuit Judge*, concurring and dissenting.

Although I gladly join Judge Eschbach in Part A of his opinion affirming the grant of summary judgment in behalf of the defendants on plaintiff's due process claim, I respectfully dissent from Part B reversing the grant of summary judgment in behalf of defendants on plaintiff's First Amendment claim.

Some additional overview may be helpful. This case is a minor remnant of class action litigation begun in 1974 against the Illinois Department of Revenue concerning the enforcement of the Illinois Cigarette Tax Act against persons bringing cigarettes into the State of Illinois. Benson, who was not named in that suit, was under contract to the Department to provide certain technical services in enforcement of the Act. That contract expressly provided that Benson was to be an "independent contractor" with the exception that he would be considered a state employee for liability purposes only, so that he would be covered by the Department's insurance.

In 1975, four separate civil rights actions were filed in the district court concerning the Act's enforcement. Benson was named as a defendant along with others in the Department. There were also four other related civil rights actions pending in which Benson was not involved. During the course of all this litigation, Benson filed an affidavit critical of the Department. Three days later his contract was terminated. His employment contract provided that it was terminable on written notice by either party.

The Illinois Attorney General initially represented all defendants, including Benson, in all eight civil rights suits. However, it soon appeared to the Attorney General, not surprisingly, that there was no way to harmonize the defenses of his various state clients. All defendants were advised to retain their own counsel and the Attorney General withdrew as counsel in all the cases except in behalf of himself as a separate defendant.

In addition to the eight civil rights cases already pending, Benson added two more of his own: one against the Director of the Department and others; and a second against the Governor and others. Benson complained that due process entitled him to a hearing before his technical services contract was terminated, and secondly, that he was entitled to another hearing before the Attorney General could withdraw as his counsel. Benson no longer contests the validity of his employment contract termination.

In the four civil rights suits in which Benson was a defendant, the state insurance carrier provided Benson with counsel without expense to him after the Attorney General withdrew. Benson nevertheless later also hired two private attorneys for those cases.

In 1977, before all this was over, new state legislation was passed providing for representation of state employees in certain civil cases, but not for independent contractors. Citing this Act, Benson again requested that the Attorney General represent him in the civil rights actions in which he was a defendant, claiming that the other state defendants had been reimbursed for their private counsel. The Attorney General again declined to represent Benson since he viewed Benson as an independent contractor and therefore as not entitled to that representation. Benson then tried in one of his own civil rights actions in which he was plaintiff to prevent the Attorney General from authorizing use of private counsel for the state defendants he had named. Former Judge Alfred Kirkland ruled that the Attorney General had properly declined representation due to a conflict of interest and had not exceeded his powers in authorizing private counsel.

Later, Judge McMillen approved settlement of the four civil rights cases in which Benson had been a defendant, all without any financial liability falling on Benson.

In Benson's own two consolidated civil rights cases, former Judge John Crowley entered partial summary

judgment against Benson because Benson failed to show a property interest in continued employment, and further on the ground that Benson had no cause of action against the Department for withdrawal of state-supplied legal counsel. On Benson's motion for reconsideration, Judge Aspen, now favored with those cases, ruled as Judge Crowley had before him, but noted that Benson did have counsel supplied by the state's insurance carrier. Benson then sought to add as defendants, Scott, then Attorney General, and Caplan, his assistant. That was denied.

Now we finally get to this separate civil rights lawsuit which Benson next filed naming Scott and Caplan as defendants, and charging due process and First Amendment violations in his lack of state representation. Judge Roszkowski first drew this lawsuit, but after some additional activity, the case was reassigned to Judge Hart, whose summary judgment decision we are now reviewing.

In Judge Hart's summary judgment proceeding, the facts of Benson's actual representation were clarified. Benson was supplied counsel by the state insurance carrier without expense to him in the four civil rights actions in which he was a defendant and which were finally settled without expense to Benson. The insurance carrier had for a time, in addition, also partially paid the fees of Benson's private attorneys. There was a period when the expenses of Benson's private attorneys were not paid by the insurance carrier, but that was simply because the insurance carrier was providing Benson with other counsel without expense to Benson. What the case really amounted to was that Benson claimed he was entitled to be represented by two sets of attorneys at state expense.

Judge Hart held against Benson, granting defendants' motion for summary judgment on the basis that the state defendants enjoyed qualified immunity and that Benson had not been deprived of property rights without due process.

Now, after ten years of litigation, twelve separate lawsuits (one of which Benson was a witness in, four of

which he was a defendant in, and three of which he started on his own), and more than five district court judges later, it is doubtful that anyone remembers or cares that what originally started all this was cigarettes. Those cases were all long ago disposed of, but Benson has managed to perpetuate this litigation remnant. Benson emerged from the original litigation with no liability and no need to have personally expended anything for his legal representation. Now he has succeeded in involving us in peripheral constitutional issues about which we cannot agree. The mere brief recitation of this litigation story suggests to me that, as a practical matter, much of it was unnecessary. I would affirm on the basis of Judge Hart's memorandum opinion in less time than it takes to recount Benson's stubborn continuing quarrel with everybody.

As the majority correctly points out, to overcome a claim of qualified immunity by an executive official, the official's conduct must "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 102 S. Ct. 2727, 2738 (1982). Benson was labeled an independent contractor in the contract he signed, so he appeared not to be entitled to state representation before or after the new Act was passed. State employees are not hired by a special contract as independent contractors who may be fired, with or without cause; they are just hired. The Attorney General took the logical, reasonable position that Benson was an independent contractor and, as such, was excluded from representation. Nothing suggests otherwise.

In spite of these circumstances, Benson claims that the defendants' refusal to provide substitute representation or to reimburse him for his legal expenses are in retaliation for exercising his First Amendment rights. However, counsel was furnished to Benson without expense by the state's insurance carrier, and the private counsel expense Benson assumed for only a short time was of his own unnecessary doing. Although I agree with the majority that to premise the denial of a valuable government benefit on a person's exercise of his First Amendment rights violates the First

Amendment even if no independent legal entitlement to that benefit exists, I believe that the defendants' refusal to reimburse Benson for the fees of his privately-retained attorneys was objectively reasonable under *Harlow*. If, after the Attorney General withdrew from his joint representation of all defendants in the eight civil rights cases, the state had initially agreed to pay Benson for substitute legal representation but then refused to continue after Benson criticized the Department, Benson might have a First Amendment claim. But such is not the case. I believe the state officials had qualified immunity and were entitled to it. I consider Benson's alleged whistle-blowing to be an irrelevant non-First Amendment issue in these circumstances.

There is some question about disposing of all of this by summary judgment, but the material facts are not disputed by anything except legal arguments and collateral allegations that would require us to search unnecessarily behind the technical services contract and to assume the Attorney General was wrong about his ethical decision and his informed view of the circumstances upon which he reasonably acted.

In *Harlow*, 102 S. Ct. at 2737 (quoting *Butz v. Economou*, 438 U.S. 478, 507 (1978)), the Supreme Court reaffirmed that: "In identifying qualified immunity as the best attainable accommodation of competing values . . . we relied on the assumption that this standard would permit '[i]nsubstantial lawsuits [to] be quickly terminated.' " I would recognize the qualified immunity of the state defendants and bring all this to a long overdue close. As it is, the next issue will be Benson's claim for fees in this appeal followed by more proceedings before yet another district court judge and another appeal by one of the parties back to this court. I would support Judge Hart in his disposition of this case.

SWYGERT, *Senior Circuit Judge.* I concur with the opinion of this court that the defendants are not entitled to qualified immunity with respect to Benson's first amendment claim. I dissent, however, from the court's opinion on Benson's due process claim. I conclude that the latter claim involves material questions of fact that cannot be determined in a summary judgment proceeding, *see* Fed. R.Civ.P. 56(c), and would remand the claim to the district court.

The majority assumes, as do I, that state employees have a right to be represented by the state in civil actions brought against them arising out of their employment. *Ante* at 6. Thus, Benson's procedural due process claim involves the question of what process was due him before the defendants could reject his request for state-provided representation. *See Larry v. Lawler*, 605 F.2d 954 (7th Cir. 1978). Under *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), the defendants were required to provide only those procedural safeguards that were objectively reasonable in light of established law and policy. I agree with the majority that there is no law establishing the precise process to be afforded before denying an application for state-provided representation. I also agree that the process due in any given case depends on the circumstances of the case and the nature of the interests involved. *See ante* at 7-8. I disagree, however, that the absence of clearly established procedures renders "reasonable" any procedures afforded Benson by the defendants.

At least since *Goldberg v. Kelly*, 397 U.S. 254 (1970), the law has been clearly established that once a protected property interest is established, the state cannot deprive a person of that interest without affording some procedural safeguards. Those safeguards include, at a minimum, notice and an opportunity to be heard. "It is axiomatic that before the government can deprive a person of a protected interest in property, the due process guarantee of the Constitution requires 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an

opportunity to present their objections.' " *Gallagher & Ascher Co. v. Simon*, 687 F.2d 1067, 1076 (7th Cir. 1982) (quoting *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 13 (1978)). In the absence of established law defining the precise procedures to be followed in a given instance, precision is not required of government officials. This is not to say, however, that officials are not therefore required to afford a claimant any procedures. They are still required to provide some minimal notice and hearing procedures.

I conclude that it cannot be determined on the present record whether the procedures afforded Benson met the minimal standards of due process and would remand the issue to the district court. The record shows only that Benson sent a letter to the Attorney General's office requesting representation in the civil rights actions pending against him and that Benson was sent a letter from defendant Caplan denying the request. The record does not indicate what if any type of review was made of Benson's application or what procedures if any were available to Benson to contest an unfavorable decision. Thus, it is impossible to determine whether the procedures used to determine that Benson was not entitled to representation were reasonably calculated to afford Benson notice and an opportunity to be heard.

In addition to a procedural due process claim, I find that Benson states a substantive due process claim that raises material questions of fact. Benson alleges that irrespective of the procedures used by the defendants, the decision to deny him state-provided representation was arbitrary and contrary to established law and practice. This court has recognized that arbitrary state action depriving a person of life, liberty, or property may constitute a substantive due process violation. *See United States ex rel. Hoover v. Franzen*, 669 F.2d 433, 445 n.28 (7th Cir. 1982); *Jeffries v. Turkey Run Consolidated School District*, 492 F.2d 1, 3-4 (7th Cir. 1974). Under *Harlow, supra*, the question before this court is whether the defendants' decision to deny Benson's request for state-provided

representation, on the basis of a letter from the Department of Revenue declaring that Benson was an independent contractor, was objectively reasonable.

The Indemnification Act requires the State to provide representation or indemnification to its employees in accordance with the terms of the statute. The definition of "employee" expressly excludes independent contractors. 1981 Ill. Rev. Stat. ch. 127, § 1301. Whether a worker is classified as an employee or an independent contractor is a critical question in many employment-related claims. *See, e.g., Alexander v. Industrial Commission*, 72 Ill. 2d 444, 448, 381 N.E.2d 669, 670 (1978) (only employees entitled to award under Workmen's Compensation Act); *Byrne v. Stern*, 103 Ill. App. 3d 601, 604-05, 431 N.E.2d 1073, 1075-76 (1981) (employer is liable under Liquor Control Act only for conduct of employees); *Dumas v. Lloyd*, 6 Ill. App. 3d 1026, 1030, 286 N.E.2d 566, 569 (1972) (employer is liable only for negligent acts of employees). The law in Illinois is clearly established that the characterization of the worker by the employer does not determine whether the worker is an employee or an independent contractor. *See Bauer v. Industrial Commission*, 51 Ill. 2d 169, 170-72, 282 N.E.2d 448, 449-51 (1972); *Manahan v. Daily News-Tribune*, 50 Ill. App. 3d 9, 14, 365 N.E.2d 1045, 1049 (1977). Rather, the courts will examine a variety of factors, the most important of which is the worker's right to control the manner of doing work. Other factors to be considered include whether the worker is compensated on a time basis or by the job, whether the employer maintains the right to discharge the worker, the nature of the worker's occupation in terms of the degree of skill required and its relationship to the regular business of the employer, and whether the employer furnishes the worker with materials or equipment. *See Alexander v. Industrial Commission, supra*, 72 Ill. 2d at 449, 381 N.E.2d at 670.

Benson alleges, among other things, that he performed his duties pursuant to the direction, control, and instructions of Department supervisors; his conduct was super-

vised on a day-to-day basis by his superiors; he performed the same duties as a Security and Fraud Investigator, which has been a Civil Service position since 1969; he was issued state equipment by his superiors, including an investigator's badge, a radio, handcuffs, state license plates, FBI training materials, and an Employee's Handbook; he was authorized by the Department to carry a service revolver while performing his official duties and received training by the Department in the use of firearms. In addition, Benson's contract with the Department provided for compensation on a time basis and authorized the Department to discharge Benson at will. These allegations are sufficient to raise a factual question whether Benson was an employee or an independent contractor. This question cannot be resolved on the basis of a single sentence contained in the employment contract. *Cf. Bauer v. Industrial Commission, supra,* 51 Ill. 2d at 170-72, 282 N.E.2d at 449-51 (examining the control and authority exercised by employer to determine worker's status despite statement in contract that worker was an independent contractor).

More importantly for the issue on appeal in the instant case, Benson's allegations raise a material question whether an attorney general, who is presumed to know the law of the state that he represents, could have reasonably decided that Benson was an independent contractor. The answer to this question depends, in part, on facts not in the record such as what information concerning the terms of Benson's employment was available to the defendants. Thus, I find that summary judgment was improper on this claim as well.*

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* Having concluded that Benson's due process claim survives summary judgment on the issue of defendants' qualified immunity, I note my disagreement with the district court's finding that Benson did not state a due process claim under section 1983 because alternative remedies provided him all the process that was due. *See Benson v. Scott,* No. 81-C-6591, Mem. Op. at 10-12 (N.D. Ill. Dec. 29, 1982). Post-deprivation remedies, such as those cited

(Footnote continued on following page)

For the foregoing reasons, I dissent from Part II.A. of the court's opinion.

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Clerk of the United States Court of Appeals for the Seventh Circuit

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* *continued*

by the district court, satisfy the due process clause only if pre-deprivation process is impracticable. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982); *Vail v. Board of Education*, 706 F.2d 1435, 1440-41 (7th Cir.), *cert. granted*, 104 S. Ct. 66 (1983); *Bonner v. Coughlin*, 517 F.2d 1311, 1319 & n.24 (7th Cir. 1975), *modified en banc*, 545 F.2d 565 (7th Cir. 1976), *cert. denied*, 435 U.S. 932 (1978); *Begg v. Moffitt*, 555 F. Supp. 1344, 1353-65 (N.D. Ill. 1983). There was no showing that pre-deprivation process was impracticable in the instant matter. Moreover, the remedies cited by the district court are too vague and speculative to supplant Benson's section 1983 remedy. *See Logan v. Zimmerman Brush Co.*, *supra*, 455 U.S. at 436-37; *Evans v. City of Chicago*, 689 F.2d 1286, 1298 (7th Cir. 1982).

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge: Honorable William T. Hart

Cause No.: 81 C 6591 Date: Dec. 29, 1982

Title of Cause: William T. Benson v. William J. Scott and Herbert Caplan

Pursuant to Memorandum Opinion and Order, defendants' motion for summary judgment is GRANTED; summary judgment is hereby entered in favor of defendants and against the plaintiff, and this action is dismissed with prejudice.—DRAFT.

/s/ Hart, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WILLIAM J. BENSON,

Plaintiff,

No. 81 C 6591 v.

WILLIAM J. SCOTT and HERBERT CAPLAN,

Defendants.

MEMORANDUM OPINION AND ORDER

This matter is now before the Court for consideration of cross motions for summary judgment. The defendants previously moved to stay discovery pending a consideration of their claims of state officials' qualified immunity from suit. That motion was based on the ruling of the Supreme Court in the recent case of *Harlow v. Fitzgerald,* 102 S. Ct. 2727 (1982). Based on the documents presented it appeared that discovery should be stayed.[1]

On July 23, 1982, the Court heard oral argument, at which time the parties were also informed that pursuant to Fed. R. Civ. P. 12(c), the Court would consider all documents which had been attached to the various pleadings and briefs in connection with the defendants' pending motion to dismiss (treated by the Court as a motion for summary judgment). Pursuant to Rule 12(c) and Rule 56, the parties were allowed to file such additional plead-

[1] The effect of the stay was to prevent the plaintiff from taking the depositions of the defendants.

ings and documents as they might wish before further consideration of the pending motion. The plaintiff amended his complaint and filed a cross motion for summary judgment.

This case is one of three civil rights actions initiated by plaintiff (or "Benson") against officials of the State of Illinois (Case Numbers 77 C 3713 and 77 C 3212 are consolidated and pending before Judge Aspen). In these actions plaintiff claims violations of 42 U.S.C. § 1983, alleging that officials of the State of Illinois violated his First and Fourteenth Amendment rights. The litigation has been complicated by many motions, cross motions, and rulings to the extent that it is necessary to state in detail the history and nature of plaintiff's claims in order to focus properly upon the rights he seeks to vindicate in this case.

The defendants in this action are William J. Scott, former Attorney General of Illinois, and Herbert Caplan, former First Assistant Attorney General of Illinois. It is plaintiff's claim that in retaliation for his exercise of his First Amendment rights and in deprivation without due process of law of property rights protected under the Fourteenth Amendment, Scott and Caplan denied Benson legal representation and reimbursement of attorney's fees incurred by him in defending civil rights actions, more fully described below, brought against him in this Court. Plaintiff seeks actual or nominal damages for violation of his constitutional rights, punitive damages and attorneys fees and costs.[2]

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[2] In case numbers 77 C 3212 and 77 C 3713, consolidated, plaintiff also included a claim for alleged denial of legal representation. However, on June 29, 1981, the Court (Crowley, J.) ruled that any such claim could only be brought against the Attorney General of Illinois. Thereafter plaintiff instituted this action. Plaintiff's claims for wrongful termination of his employment or service contract are pending before the Court in the other proceedings.

Plaintiff entered into contracts with the Department of Revenue of the State of Illinois for so-called technical services. Under the terms of the contracts, plaintiff was obligated to act as a cigarette tax investigator in the Indiana area. The expiration date of the last contract was June 30, 1976. Plaintiff claims that under the terms of the contracts he was an employee of the State of Illinois and as such was entitled to be defended in any civil rights actions by reason of State policy or law. The defendants claim that plaintiff was an independent contractor. His status as an employee or independent contractor is said to be relevant because his contracts state that "it is expressly agreed that for liability insurance purposes only William Benson will be considered as an employee rather than as an independent contractor."

On March 31, 1975, January 28, 1976, February 5, 1976, and February 19, 1976, civil rights actions pursuant to 42 U.S.C. § 1983 were filed in this Court, docketed as numbers 75 C 1022, 76 C 0298, 76 C 0408, and 76 C 0599 ("the four civil rights actions"), naming Benson as a defendant. Other parties named as defendants were officers and investigators of the Illinois Department of Revenue. All of the defendants, including Benson, were represented by the Illinois Attorney General. These four civil rights actions grew out of the Illinois Department of Revenue's enforcement of the Illinois Cigarette Tax Act against persons who were bringing cigarettes into the State of Illinois from places outside the State of Illinois where Benson was employed as a tax investigator.

Prior to the filing of the four civil rights actions against Benson and others in this Court, litigation had been initiated in state court challenging the Department of Revenue's enforcement procedures. In a case entitled *O'Leary v. Allphin*, 74 C 1378, filed in the Circuit Court

of Cook County, Illinois, illegal procedures were charged and an effort was made to enjoin the enforcement of the Cigarette Tax Act. It appears that in that proceeding Benson submitted an affidavit to the Circuit Court stating that the Department of Revenue had withheld information, destroyed records and disobeyed court orders.[3] On June 24, 1976, shortly before Benson submitted his affidavit to the Circuit Court in *O'Leary v. Allphin*, his contract with the State of Illinois was terminated.

On September 2, 1976, the Attorney General of Illinois advised Benson, the Director of the Department of Revenue, and the other parties in the four civil rights actions, that based on developments with respect to the pending litigation a direct conflict of interest appeared to exist which necessitated the Attorney General's withdrawal as counsel for all defendants. By court order, the Attorney General was granted leave to withdraw as counsel for all defendants, including plaintiff. The defendants other than Benson were immediately allowed to obtain other attorneys at the expense of the State.

Benson did not have substitute representation in those proceedings until October 3, 1977, when the firm of Querrey, Harrow, Gulanick & Kennedy, Ltd. entered its appearance on his behalf at the direction of the insurance company providing liability insurance to the State pursuant to the terms of Benson's contracts. Shortly after that date Benson also elected to have his individual attorneys enter their appearances in the proceedings. During oral argument this Court was informed that all fees and expenses of the attorneys selected by the liability car-

[3] The Circuit Court of Cook County entered an order punishing as contempt of court violations of its injunctive order. The Circuit Court's orders were reversed on appeal. *O'Leary v. Allphin*, 64 Ill.2d 500 (1976).

rier to represent Benson were paid by the insurance company, and that the fees of Benson's individual attorneys also were paid from December, 1978 to the date of the proceedings against him were dismissed (Tr. 7/23/82, pp. 8-10, 31-35).

On March 9, 1981, the four civil rights actions pending against Benson in this Court were settled and dismissed with prejudice. (All four cases were assigned to Judge McMillen.) The action taken to obtain the dismissals did not require the expenditure of any funds on Benson's part (*Id.*, p. 33).

As a successful party in suits brought under 42 U.S.C. § 1983, Benson was entitled to apply for attorneys' fees if any had been incurred by him. 42 U.S.C. § 1988. Benson was unrepresented in the proceedings during the period from September, 1976 to October 3, 1977, but he appears not to have been harmed by appearing without counsel during this period. The only out of pocket expenses he eventually incurred were for his additional individual attorneys during the period from October, 1977 to December, 1978. The insurance company directed that no application for fees in the four cases be made on his behalf, and Benson did not request fees on his own behalf (*Id.*, pp. 34-37).

Relevant to the claims which Benson makes here is an act of the State of Illinois entitled "An Act to Provide for Representation and Indemnification in Certain Civil Law Suits, etc." P.A. 80-1070a approved and effective December 3, 1977, Ill. Rev. Stat. ch. 127, § 1301, *et seq.* It is apparently agreed by the parties that this statute codified what had been the previous policy of the State: to defend and indemnify state employees in civil rights suits arising out of their employment. Section 1302(a) of ch. 127 provides in pertinent part as follows:

> In the event that any civil proceeding is commenced against any state employee alleging the deprivation of a civil or constitutional right and arising out of any scope or omission occurring within the scope of the employee's state employment, the Attorney General shall, upon timely and appropriate notice to him by such employee, appear on behalf of such employee and defend the action . . .

"Employee" is defined in Section 1301(b) as "any present or former elected orf appointed officer, trustee, or employee of the State, or of a pension fund, . . . *but does not mean an independent contractor*" (emphasis added). Benson claims that a material question of fact exists as to whether or not he was an employee within the meaning of this Act. If, as he states, he was an employee, then he claims that the Attorney General deprived him of property—his right to legal representation—without due process of law, under color of law, when he denied him representation under this Act.

In Section 1302(h) of the Act provision is made for state employees to give notice to the Attorney General as provided in the Act within 30 days after the Act's effective date. The Act further provides in Section 1302(b) as follows:

> In the event that the Attorney General determines that so appearing and defending an employee either (1) involves an actual or potential conflict of interest, or (2) that the act or omission which gave rise to the claim was not within the scope of the employee's state employment or was intentional, willful or wanton misconduct, the Attorney General shall decline in writing to appear or defend or shall promptly take appropriate action to withdraw as attorney for such employee. Upon receipt of such declination or upon such withdrawal by the Attorney General on the basis of an actual or potential conflict of interest, the

> state employee may employ his own attorney to appear and defend, in which event the state shall pay the employee's court costs, litigation expenses, and attorneys fees to the extent approved by the Attorney General as reasonable, as they are incurred. *In the event that the Attorney General declines to appear or withdraws on the grounds that the Act or omission was not within the scope of employment,* or was intentional, willful or wanton misconduct, *and a court* or jury *finds the act or omission of the state employee was within the scope of employment and was not intentional, willful or wanton misconduct, the state shall indemnify the state employee for any damages awarded and court costs and attorneys' fees assessed as part of any final and unreversed judgment.* In such event, the state shall also pay the employee's court costs, litigation expenses, and attorneys' fees to the extent approved by the Attorney General as reasonable. (Emphasis supplied).

On December 28, 1977, Benson gave timely notice to the Attorney General under the cited Act requesting representation in the four pending civil rights actions. He was, however, at that time represented by the attorneys selected by the state's liability insurance carriers, and the Attorney General had previously withdrawn from the actions because of a perceived conflict of interest. In any event, the Attorney General replied to this request by advising Benson that he was ineligible under the Act because he was not a state employee.

Benson claims that the act of the Attorney General, in September, 1976, withdrawing his representation in the four civil rights suits was in retaliation for Benson's exercise of First Amendment rights because he was "a whistleblower." He asserts that when he submitted his affidavit to the Circuit Court detailing improper conduct on the part of members of the Department of Revenue he became a target of state retaliation.

However, the threshold issue is whether or not the defendants are officials entitled to qualified immunity from suit by reason of their performance of discretionary acts within the meaning of *Harlow v. Fitzgerald, supra.* That case provides that so long as actions of high government officials are objectively reasonable, no further inquiry should take place. The policy rationale of *Harlow* is that public officials should not hesitate to engage in decision-making for fear that they may later be subject to civil liability for their official acts. Thus, while Benson claims the act of the Attorney General in withdrawing representation was in retaliation for his exercise of First Amendment rights, it appears that the Attorney General's decision passes the objective test set forth in *Harlow.*[4]

Scott withdrew representation of Benson on the basis of a perceived conflict of interest. Benson's own affidavits submitted to the Circuit Court on July 21, 1976 and to this Court as an exhibit attached to his original complaint, demonstrate that there was a potential conflict of interest among and between the Department of Revenue defendants. Moreover, the Attorney General could well have initially questioned whether Benson was "a whistleblower" or himself a wrongdoer who would be subject to prosecution or liability for his conduct. On this basis, it was objectively reasonable for the Attorney General to withdraw his representation of Benson in the civil rights actions. Because the threshold qualified immunity issue must be resolved in favor of the defendants, it is unnecessary to reach the issue of whether under any set of circumstances plaintiff can sustain the burden of proof regarding alleged retaliatory actions taken in response to his exercise of his

[4] Since the objective test of *Harlow* is met, discovery aimed at finding out what the defendants actually intended vis a vis Benson—subjective evidence—is irrelevant.

First Amendment rights under *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977).

Plaintiff also claims a deprivation of property rights without due process of law in violation of the Fourteenth Amendment. It appears that this claim is also without merit. Assuming, for purposes of disposition of the defendants' motion for summary judgment, Benson was an employee of the state, then he had a protectible property interest in reimbursement of legal fees pursuant to state policy or the indemnification statute adopted on December 3, 1977. But there was no taking or property without due process because plaintiff had a right to be heard had he sought recovery of fees or expenses under any of various avenues.

First, as stated in Section 1302(b) of the Indemnification Act (Ill. Rev. Stat. 1982, ch. 127, § 1302(b)), plaintiff was entitled to seek a determination by a court (in this case Judge McMillen, who dismissed the four civil rights actions with prejudice) that his acts or omissions in question were within the scope of his *employment* and that was not an "independent contractor" as that term is used in his contracts and in the legislation under consideration. Plaintiff did not seek this determination by Judge McMillen. Had he done so successfully, he would have come within the terms of the statute and would be entitled to fees and expenses if any were properly incurred.

Second, as a successful party in an action brought pursuant to Section 1983, Title 42 U.S.C., plaintiff might have sought attorneys' fees as a prevailing party in the four civil rights actions. Benson chose not to do so. It does not appear to this Court that either of these remedies would have been insufficient. Due process existed to afford Benson the opportunity to recover his alleged damages.

Third, if, as the Attorney General thought, Benson was an independent contractor, he could seek proper reimbursement if any was due him pursuant to the terms of his contracts and the liability insurance policy which was obtained from the liability carrier that assumed responsibility for his defense in October, 1977. Although plaintiff was without counsel for approximately one year, it is clear that the loss of that representation was not damaging to his interest in favorable disposition of those proceedings. Moreover, once the insurance company provided counsel of record for Benson in October, 1977, he had no recognized property interest in obtaining additional counsel at the expense of the state.

Finally, given the provisions of the statute in dispute, the language of Benson's contracts with the State and the legal assistance provided to him under those contracts by the liability insurance carrier, it was objectively reasonable for the Attorney General to conclude that Benson was not a state employee entitled to representation but was rather an independent contractor. Accordingly, the defendants are also entitled to qualified immunity from suit on Benson's asserted Fourteenth Amendment claim. *See Harlow v. Fitzgerald, supra.*

Conclusions

Based on the conclusions here stated it is unnecessary to hold a hearing for the purpose of determining the only factual issue in dispute—whether or not Benson was an employee or independent contractor. Whether or not he had a property interest which arose by virtue of being either an employee or an independent contractor, there was no taking without due process and the defendants are also entitled to claim qualified immunity from suit.

Summary judgment is hereby entered in favor of defendants and against the plaintiff, and this action is dismissed with prejudice.

Enter:

/s/ William T. Hart

Dated: Dec. 29, 1982

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

July 2, 1984.

Before

Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. JESSE E. ESCHBACH, *Circuit Judge*
Hon. LUTHER M. SWYGERT, *Senior Circuit Judge*

No. 83-1040

WILLIAM J. BENSON,

Plaintiff-Appellant,

vs.

WILLIAM J. SCOTT and HERBERT CAPLAN,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 81 C 6591
William T. Hart, *Judge.*

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by defendants-appellees, majority of the judges on the panel* have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable Harlington Wood, Jr., voted to grant a rehearing.

Office-Supreme Court, U.S.
FILED
OCT 20 1984
ALEXANDER L. STEVAS,
CLERK

(2)

No. 84-456

In The

Supreme Court of the United States

October Term, 1984

—o—

WILLIAM J. SCOTT and HERBERT CAPLAN

Petitioners,

vs.

WILLIAM J. BENSON,

Respondent.

—o—

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the right of employees to be free from retaliation for their exercise of First Amendment rights was clearly established in 1976, thereby negating Defendants' qualified immunity claim on a summary judgment motion.

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No. 84-456

In The

Supreme Court of the United States

October Term, 1984

WILLIAM J. SCOTT and HERBERT CAPLAN

Petitioners,

vs.

WILLIAM J. BENSON,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STATEMENT

Respondent WILLIAM J. BENSON (Benson) initiated this action under 42 U.S.C. § 1983 on November 24, 1981, alleging that WILLIAM J. SCOTT (Scott), former Illinois Attorney General, and HERBERT CAPLAN (Caplan), former Illinois First Assistant Attorney Gen-

eral, violated Benson's rights under the First and Fourteenth Amendments. The district court entered summary judgment for the Defendants, finding that they were entitled to qualified immunity from liability for their actions on both claims.

The Seventh Circuit affirmed the district court's finding of immunity with respect to Benson's due process claim but reversed the district court on the First Amendment claim. It is Benson's First Amendment retaliation claim which is now before this Court.

Benson adopts, as his Statement of the case, the statement contained in the opinion of the Seventh Circuit, which appears at A-2 through A-5 of the Scott/Caplan petition.

It should be noted, however, that Benson's disseminations to the news media and law enforcement agencies of information and evidence concerning improprieties in the state court proceedings included, *inter alia,* the allegation that an Illinois Assistant Attorney General had personally ordered the alteration and destruction of Illinois Department of Revenue records and the subornation of false testimony.

ARGUMENT

The issue in this case does not warrant review on certiorari. The right of employees to be free from retaliation for their exercise of First Amendment rights has been clear at least since *Pickering v. Board of Education,* 391 U.S. 563 (1968). The First Amendment vio-

lation which Benson asserts occurred in 1976 and continued through 1981.

In *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982) this Court held that whether an official may prevail in his or her qualified immunity defense depends upon the "objective reasonableness" of his or her conduct as measured by reference to clearly established law. In *Davis v. Scherer,* 104 S.Ct. 3012 (1984) this Court again emphasized that "no other circumstances are relevant to the issue of qualified immunity *Id.,* at 3016.

In reversing the district court, the Seventh Circuit correctly found that:

> In determining whether the actions alleged by Benson violate clearly established law, however, the relevant legal framework is not the Illinois Indemnification Act, as the Defendants and the district court believed. Benson's claim is that the Attorney General violated his rights under the First Amendment. This claim does not require Benson to show that he had a right to reimbursement under the Act, for even where there is no right to a valuable government benefit, the denial of that benefit may not be premised on an employee's exercise of his First Amendment rights. (citations omitted). A-8

The only relevant consideration on Benson's First Amendment claim is whether it was objectively reasonable for the Defendants to retaliate against Benson for his exercise of First Amendment rights. Petitioners concede that they cannot do so at page 11 of their petition; that is the end of the case.

It was not objectively reasonable in 1976 to retaliate against an employee for exercising his or her First Amendment rights. *Pickering,* supra; *Hostrop v. Board*

of Junior College District, No. 515, 471 F.2d 488, 491-93 (7th Circuit), cert. denied, 411 U.S. 967 (1973).

The decision of the Seventh Circuit is in full accord with the principles expressed in decisions of this Court and those decisions of the Court of Appeals which have had occasion to address this subject matter.

The foregoing reasons should be compelling to suggest to this Court to deny certiorari.

CONCLUSION

For the foreoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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